Citation: *R. v. Krisza et al.*, 2007 ONCJ 471

ONTARIO COURT OF JUSTICE
AT OWEN SOUND

BETWEEN

HER MAJESTY THE QUEEN

Applicant

and

GUY CHARLES KRISZA
KENNETH VANDERBURGH
DEAN KULICH
THOMAS HUTTON
CARL BOICE
KEVIN BRAD SCHWASS

Respondents

Appearances

Mr. Gonsalves	Counsel for the Ministry of the Attorney General
Mr. Leitch	Counsel for Mr. Krisza
Mr. Thompson	Counsel for Mr. Vanderburgh
Mr. Reid	Counsel for Mr. Kulich
Mr. Robertson	Counsel for Mr. Hutton
Mr. Conlan	Counsel for Mr. Boice
Mr. Shaw	Counsel for Mr. Schwass

REASONS ON MOTION FOR JOINDER

On 5 October 2007 I heard final submissions on the prosecution application to join essentially all of the provincial offence hunting charges and criminal charges of cruelty to an animal against the defendants. This application is opposed in whole or in part by all of the defendants. (In the case of Mr. Krisza

eleven of the provincial offences charges laid against him are not the subject matter of this application.)

On the basis of the overview of the case provided to me there was an undercover operation that involved an officer on 5 of 7 dates hunting with and or spending time with the 6 defendants on some or all of the 7 dates between December 13, 2005 and March 4, 2006.

At this time the provincial offence charges are in the criminal court.

The defendants are separately charged with the hunting charges. Some of them are jointly charged on three informations relating to the criminal charges on offence dates of January 22, February 10 and 11 in 2006. Some of the defendants are separately charged on cruelty charges.

I have tried to find a consensus. In that regard there was some progress made between the first date this matter was before me, September 24th 2007, and the last date.

Four of the defendants, Messrs. Boice, Krisza, Kulich, and Hutton appear to agree that the criminal charges should be jointly tried. They would agree to the hunting charges being tried jointly but not in the same proceeding as the criminal charges. While not in uniform agreement these defendants will or may agree to the hunting charges being heard by the judge that does the criminal trial with the

adoption of the relevant evidence from the criminal trial into the provincial offences trial.

The crown will accept that procedure if there is agreement at the outset of the criminal trial that the criminal charges would be heard first and the relevant evidence from that trial adopted into the provincial offences trial, with the same judge hearing both matters.

Mr. Schwass objects to being joined in a trial with the other defendants. Mr. Shaw wants his client to have a one criminal trial, as his client only faces one cruelty to animal charge. The 12 hunting charges his client faces, arising over 2 days, should be heard in the Provincial Offences Court. The allegation of cruelty to an animal arises on one of the dates that the hunting charges arise on.

Mr. Vanderburgh, through his counsel's written submissions objects to any joinder. If it is ordered he argues that there should be 2 different trials on the criminal matters driven by the 2 dates of his alleged offences. He objects to the 24 hunting charges he faces being heard with the criminal charges. The hunting charges should be heard in the provincial offences court.

This application raises a number of issues, which include:

1. On the matters that the defendants are not already jointly charged can I direct they be tried together on the criminal charges?

2. Can I direct that the defendants be tried together on the hunting charges?

3. If I direct that the defendants be tried together jointly on the criminal charges and on the hunting charges can I direct that there be one trial proceeding in the Ontario Court of Justice covering all of the charges?

4. If I cannot order one trial proceeding for both the criminal and hunting charges can I direct that one set of charges be heard first with a trial of the other charges in front of the same judge who heard the first trial?Can I do this where some but not all of the defendants agree to such a procedure?

I have considered the merits of each argument. It would of course be better if I could find a consensus with counsel but I cannot find it.

The Criminal Charges

I do have the jurisdiction to join criminal charges and direct that there be one or more trials, where there are separate informations charging more than one person before the court. (See R. v. Clunas,[1992] 1S.C.R. 595 at paragraphs 31 and 32.) In Clunas the court directed that where consent to joinder is not given the trial court should explore why. Joinder can only be ordered where it is in the

interests of justice to do so and the offences or the defendants could initially have been jointly charged. (Paragraph 33).

On the latter point it is clear that the offences – cruelty to animals, could be jointly laid. There is a factual and legal nexus alleged on a prima facie basis. Further it is clear that the accused could initially have been jointly charged given the allegation of joint hunting encounters.

Further, for the following offence dates and the following list of defendants, they are already jointly charged. There is no application to sever those counts.

These criminal charges are as follows:

1. 22 January 2006, Krisza, Schwass, Kulich, Boice, Hutton.
2. 10 February 2006, Krisza, Kulich, Vanderburgh.
3. 11February 2006, Krisza, Kulich, Vanderburgh, Hutton, Boice.

While some of the 6 defendants, such as Mr. Schwass, are only alleged to be involved in 2 of the 7 dates in question there is an underlying similarity in the facts to sustain, at least at this stage the proposition that they could have been jointly charged in the first instance.

Is it in the interests of justice to order that the separate informations under the Criminal Code and the defendants be ordered to proceed to trial in one proceeding?

Four of the defendants, Messrs. Krisza, Kulich, Hutton, Boice and the crown agree there is. Two of the defendants, Vanderburgh and Schwass disagree.

Mr. Thompson, in his written argument, states that there is a strong likelihood that his client will want to give evidence in his own defence on some but not all of the charges. He did not particularize whether it would be on the criminal and or provincial offences. He did not provide an affidavit from his client. He did state that he did not foresee calling any of the other defendants in his defence.

A joint trial would not prevent Mr. Thompson's client from testifying in his own defence if he so wished. It may be that Mr. Thompson was concerned, as his material does raise this in part, that the different evidentiary burdens between criminal and provincial offences and the different defences available between those 2 proceedings might place his client in a difficult if not impossible position. I will address that concern below.

Mr. Shaw argues that Mr. Schwass's ability to defend himself would be compromised if there was a joint trial. The basis of this argument includes the distinction between strict liability offences (the provincial offences) and the

criminal burden. It also includes the information that his client may want to testify with regard to the provincial offences and not in the criminal proceeding. I will address this concern below.

Further he argues that his client may wish to call other defendants in his defence.

Mr. Schwass faces only one criminal charge and is alleged to have been involved in these matters on only 2 of the 7 days.

Mr. Shaw also advises that he would not consent to relevant evidence heard in the criminal trial being adopted in the provincial proceedings. He envisages separate trials on all matters in the respective courts, including overlapping Charter challenges in both courts. He also envisages the hunting charges being heard in the Provincial Offences court and therefore by a different trier of fact.

Mr. Shaw also reminded the court that one of the Charter challenges will be under section 11b of the Charter, an argument that his client and potentially the other defendants have not had their trial in a reasonable time.

In R. v. Cuthbert, [1996] 106 C.C.C.(3d)28 (B.C.C.A.), the court set out the considerations for an application to sever counts on an indictment. It is accepted that these considerations are equally significant in an application for joinder.

1. The factual and legal nexus between the counts.

Mr. Krisza is alleged to be involved in 7 of the days, Messrs. Vanderburgh, Kulich and Hutton on 4 of the days, Mr. Boice on 3 of the days and Mr. Schwass on 2 as I mentioned above.

On the basis of the information before me there is a factual and legal nexus between the counts. Notwithstanding that the defendants do not overlap on all days, save for Mr. Krisza, there is a connectedness to these charges.

Counsel have also indicated that there will be charter challenges and evidentiary challenges similar to each of the alleged offences dates.

2. General prejudice to the accused.

It is particularly significant if the right to full answer and defence would be prejudiced by the imposition of an order for a joint trial. In the case of Mr. Vanderburgh he is already charged jointly with some of the other defendants on the 2 criminal allegations he faces. There are 2 informations in his situation. His counsel does not suggest that at this stage his client may wish to call a defendant on his behalf. If he wishes to testify on his own behalf he would be free to do so.

Mr. Schwass is already charged jointly on the one criminal allegation he faces. He does not seek severance. His desire to call one of those defendants as his witness raises the same issues today as it did when he was initially charged.

While potential and or real prejudice to an applicant is a significant consideration I must balance this issue with the other factors.

3. The complexity of the evidence.

This is a judge alone proceeding. There is the potential for Charter challenges, with the suggestion that at least some of the issues would be common to the defendants, for instance the issue of an 11b violation. The legal issues themselves however are not complex.

4. Possibility of inconsistent verdicts.

This is a very real prospect. There are issues common to the criminal proceedings. Counsel have indicated there will be challenges arising under the Charter including a constitutional challenge. There is the potential for expert evidence. The prospect of different trials with different judges on what was one ongoing investigation could lead to inconsistent findings.

5. The potential for multiplicity of proceedings.

Clearly this is a live issue. As the informations are currently before the court there is the prospect of separate trial proceedings against each of the defendants. In some instances the defendants wish to be tried together, whether all of the alleged offences dates affect them or not. In Mr. Vanderburgh's case he wants a separate trial by date of offence and separate trials on the criminal charges and the hunting charges.

Mr. Schwass wants a separate criminal trial by his offence date. He also wants separate trials by offence dates in the provincial offences court.

Decision on joinder of criminal charges and defendants.

I am satisfied that the crown has satisfied the burden on the joinder application for the criminal charges. The criminal charges against the defendants should proceed in one trial. That procedure would best address the societal interest in the proper administration of justice. It reduces the risk of inconsistent verdicts, and it also addresses the other considerations I have mentioned above.

The Provincial Hunting Charges

That leaves the issue of whether the hunting charges should be joined together. I have statutory authority under the Provincial Offences Act to order that charges within that legislation be tried together in accordance with section 38.

All of the defendants face hunting charges, ranging from 46 for Mr. Krisza to 12 for Mr. Schwass.

Again, save for Messrs. Schwass and Vanderburgh, counsel for the other defendants agree that the hunting charges should be heard in a joint trial. That trial should be held in the Ontario Court of Justice but not jointly with the criminal proceedings. The crown wants these charges to be tried jointly with the criminal charges.

Counsel for Messrs. Schwass wants his client tried separately on the hunting charges in the Provincial Offences court.

Counsel for Mr. Vanderburgh wants his client tried separately with 4 different trials, to reflect the 4 different days involved. Mr. Thompson does not necessarily see that a different judge would be required for the different trials. He does not appear to contemplate the provincial charges being heard in the Provincial Offences Court.

Only Mr. Gonsalves argues that I have the authority to order the hunting charges to be tried in the Ontario Court of Justice at the same time as summary conviction charges laid under the Criminal Code. He argues that while there is no express statutory authority, all of the charges, criminal and provincial are

interwoven. To have them heard in different forums, where there are underlying and shared facts would not be in the interest of the administration of justice.

Mr. Gonsalves argues that there is no risk or prejudice to the defendants to have all of the charges heard in the same forum at the same time.

Defence counsel disagree. First they point out there is no explicit statutory authority to direct, in the absence of the consent of all parties, that provincial offence charges be heard at the same time as summary conviction criminal charges. Second they argue that the defences available to a defendant differ between criminal and strict liability offences.

On the second of these 2 arguments there can be no dispute. The proposal made by Mr. Gonsalves means that if one of the defendants wanted to testify in his defence on a hunting charge but not on a criminal charge his decision would be very difficult.

On the first of the arguments I do agree there is no explicit statutory provision that counsel can point to that says such a procedure can be adopted.

However before I address these arguments I think I must first determine whether the ends of justice require the hunting charges be tried together, both the counts and the defendants. I say this because if the crown cannot persuade me on this then those charges should return to the Provincial Offences Court.

Decision on Joinder of hunting charges

In my opinion the hunting charges and the defendants should be joined. The factual underpinnings, the potential for inconsistent verdicts, the potentially common defences and the issue of judicial resources weigh in favour of this decision. While it is difficult to balance this given the consent of some of the defendants and lack of for others when I consider the overall ends of justice I believe this best addresses the test in section 38.

Should the criminal and hunting charges be heard in the same proceeding?

The other issue in this instance is whether I should order that the hunting charges be heard at the same time as the criminal charges.

There is no statutory authority that permits this. There is equally no statutory prohibition against the same.

Under the Criminal Code a judge of the Ontario Court of Justice has jurisdiction in summary proceedings. Under the Courts of Justice Act and under the Provincial Offences Act a judge of the Ontario Court of Justice has a shared jurisdiction with justices of the peace on the hunting charges.

In the event of an appeal launched on either the summary conviction matters or the provincial offence matters, if the latter are heard in the Ontario Court of Justice, the appeals would be in the Superior Court of Justice.

Counsel agree that there are situations where defence and crown agree that summary conviction criminal charges and provincial offences will be heard in the Ontario Court of Justice in the same proceeding. That is either by one trial including all of the evidence or by the evidence in the criminal matter being called first and adopting the evidence from that proceeding after arraignment on the provincial offence charges into the second set of charges.

Counsel advise that there has been no judicial determination of this issue in Ontario.

In R. v. Massick, [1985] B.C. J. No 1986, the British Columbia Court of Appeal found that a provincial offence and a summary conviction offence under the Criminal Code could be joined in the same information. There was no express authority for that proposition in either the Criminal Code or the provincial statute.

An earlier Ontario County Court decision, R. v. Spratt, [1963] 3C.C.C. 342, found that under the wording of section 3 of the Summary_Convictions Act, R.S.O. 1960, c. 387, as it then was, there was essentially an adoption of the summary conviction procedure from the Criminal Code.

The current Provincial Offences Act provides for its own procedure and specifically in section 2 thereof highlights that there are differences between the procedures in the Criminal Code and in provincial prosecutions.

In this case the defendants are charged under Part 111 of the Provincial Offences Act. Proceedings were commenced by information sworn before a Justice of the Peace. The rules of evidence at the criminal trial, including proof beyond a reasonable doubt, the use of voir dires, motions on charter applications, etc. would be essentially the same, whether in the summary conviction criminal proceeding or in the provincial proceedings.

For instance Mr. Leitch suggests that the Charter application for his client, (and as he spoke as agent for Mr. Reid, presumably for Mr. Kulick as well), should be heard at the outset of the first trial as it applied to both the criminal and hunting charges. The outcome of the Charter rulings would therefore presumably be adopted into the second trial. However, Mr. Leitch also said that he would reserve the right to ask for an order of severance at the end of the crown's case in the first trial.

Defence counsel cannot agree, even amongst those who suggest that the hunting charges should be heard after the criminal trial, that the same judge hear the hunting charges.

Decision on whether criminal charges and hunting charges should be heard in the same trial.

I believe that the administration of justice would be best served by the hunting charges being heard in the same court as the criminal charges. There is a factual and legal nexus between the sets of charges. However, there is no consent on the procedure that could be implemented to ensure that the proper administration of justice actually occurred.

For instance rulings on a section 8 and or 11b Charter application in the criminal proceeding may or may not result in the same outcome if heard in the provincial offences court, notwithstanding that the complete history of these matters has been in the Ontario Court of Justice and the outcome of the applications may have implications for both the criminal and hunting charges. The potential for inconsistent verdicts is palpable.

That potential for inconsistency, however, is not alleviated unless the trial proceedings on the criminal charges and the hunting charges are heard by the same trial judge.

I am not aware of any legal authority that gives a trial judge the right to order, absent the consent of counsel, that relevant evidence and rulings already heard and or made in a related criminal proceeding be adopted into a provincial offence trial. While trial economy, measured both in time and cost, often leads

counsel by consent to adopt this procedure, there is no rule of evidence that that the court can adopt to implement this.

The decision in Spratt was delivered at a time when the provincial legislation adopted the criminal procedure as its own. That is not the case today.

In Massick the accused conceded that he faced no prejudice if the criminal and provincial offence charges were laid in one information with the trial before one court. No such concession exists in this case. While the circumstances underlying the hunting and criminal charges in this case are similar I am not prepared to order one trial for both proceedings.

Decision on whether criminal and hunting charges should be heard in the same proceeding.

I am directing that the hunting charges remain in the Ontario Court of Justice. They should be heard by the same judge that hears the criminal charges.

The first set of charges, whether it is the criminal or the hunting charges, should proceed to judgment. If a finding of guilt is made against a defendant, the sentencing would be adjourned until the conclusion of the other proceeding.

This order does not apply to the train and trial charges, the dead animal disposal charge and one purchase coyote charge that Mr. Krisza faces.

Dated at Owen Sound this 22nd day of October 2007.

Justice J.A. Morneau